

1 **I. BACKGROUND**

2 The jury trial in this case is scheduled to begin on January 25, 2011. There will be
3 four defendants tried at that time. Defendant Jose Lopez-Buelna is charged with one count of
4 Conspiracy to Distribute a Controlled Substance, one count of Conspiracy to Launder Money,
5 two counts of Money Laundering Promotion, one count of Conspiracy to Commit
6 Kidnapping, one count of Kidnapping, one count of Conspiracy to Commit Hostage Taking,
7 and one count of Hostage Taking. Defendant Erik Dushawn Webster is charged with one
8 count of Conspiracy to Distribute a Controlled Substance, one count of Conspiracy to
9 Launder Money, and one count of Money Laundering Promotion. Defendant Roberto Lopez
10 is charged with one count of Conspiracy to Distribute a Controlled Substance and one count
11 of Conspiracy to Launder Money. Defendant Luis Vega-Rubio is charged with one count of
12 Conspiracy to Commit Kidnapping, one count of Kidnapping, one count of Conspiracy to
13 Commit Hostage Taking, and one count of Hostage Taking.

14 These charges stem from a series of events beginning in 2007. At that time, Clemens
15 Tinnemeyer was allegedly a methamphetamine customer and low-level drug seller who was
16 allegedly recruited by Defendant Lopez-Buelna to distribute cocaine from a motor home and
17 transport the monetary proceeds from the drugs to Mexico. Tinnemeyer brought his friend
18 Terri Leavy on various cocaine distribution trips originating in Las Vegas and together they
19 traveled to Atlanta, New York, and Chicago.

20 In the summer of 2008, Tinnemeyer and Leavy allegedly became unhappy with the
21 operation and decided to ignore instructions to go to Chicago. Instead, Tinnemeyer and
22 Leavy allegedly took \$4.5 million in U.S. currency that they had found in a hidden
23 compartment of the motor home and fled to the Gulf Coast of Mississippi, breaking off all
24 contact with Defendant Lopez-Buelna and his associates.

25 Defendant Lopez-Buelna attempted to reestablish contact with Tinnemeyer, but it was

1 to no avail. Consequently, on July 13, 2008, Defendant Vega-Rubio allegedly delivered to
2 Tinnemeyer's daughter a note that read:

3 For your Dad. We are waiting for you to get here. Or to call the people
4 you know. The people get wait know more. So we give you one week
5 to report your self. And to get here. We know about all your family.
6 Where they are at. So you call us. And you know were at or you know
 what going to happen. WE DON'T PLAY KNOW GAMS.

7 The note was reported to the Las Vegas Metropolitan Police Department. Defendant
8 Vega-Rubio was identified as the person who had delivered the note and the police
9 department was able to recover a latent print from the note matching Defendant Vega-Rubio's
10 print. When he was arrested on February 24, 2009, Defendant Vega-Rubio admitted that he
11 had written the note, but denied that he had delivered it to the residence of Tinnemeyer's
12 daughter.

13 Tinnemeyer was contacted by his daughter and he allegedly informed her that there
14 had been a misunderstanding but he would take care of the matter. In August of 2008,
15 Tinnemeyer and Leavy allegedly moved the money from Mississippi to Riverside, California.

16 On the morning of October 15, 2008, three months after the note was delivered,
17 Tinnemeyer's six year old grandson was kidnapped from his home by at least three men.
18 During their investigation, law enforcement officials located Tinnemeyer's motor home in
19 Mississippi and Tinnemeyer and Leavy in Riverside, California. Agents also recovered \$3.5
20 million from a storage unit rented on Tinnemeyer's behalf.

21 Law enforcement conducted surveillance on the residences of Defendant Lopez-
22 Buelna and fugitive Defendant Jesus Gastelum, executed search warrants, and recovered a .22
23 caliber firearm in the master bedroom of Defendant Lopez-Buelna's residence.

24 On October 18, 2008, three days after he was kidnapped, Tinnemeyer's grandson was
25 released and identified after he boarded a Las Vegas ParaTransit Bus and asked to be taken

1 home.

2 **II. THE MOTIONS**

3 **A. Motion to Seat Defendants at Table Nearest to the Jury (ECF No. 183)**

4 Defendant Roberto Lopez filed this Motion to Seat Defendants at the Counsel Table
5 Nearest to the Jury. The title of the Motion effectively summarizes the relief Defendant
6 Lopez is requesting: Defendant Lopez would like the Court to seat him and the rest of his co-
7 defendants at the counsel table closer to the jury. Although Mr. Lopez acknowledges that this
8 table is customarily reserved for the Government, he contends that the interests of due process
9 would be best preserved by allowing the defendants to sit beside the jury box. The
10 Government filed a Response (ECF No. 189), and Defendant Lopez filed a Reply (EFC No.
11 230). None of the other defendants have joined in this Motion. For the reasons that follow,
12 the Motion will be denied.

13 Defendant Lopez is correct that the Supreme Court has emphasized the need to
14 scrutinize courtroom practices. In *Estelle v. Williams*, 425 U.S. 501, 503-04 (1976), Chief
15 Justice Burger explained that:

16 In the administration of criminal justice, courts must carefully guard
17 against the dilution of the principle that guilt is to be established by
18 probative evidence and beyond a reasonable doubt. The actual impact
19 of a particular practice on the judgment of jurors cannot always be fully
20 determined. But this Court has left no doubt that the probability of
21 deleterious effects on fundamental rights calls for close judicial
scrutiny. Courts must do the best they can to evaluate the likely effects
of a particular procedure, based on reason, principle, and common
human experience.

22 Citing to several studies conducted in non-courtroom environments that claim people respond
23 better to those who are physically closer to them, Defendant Lopez claims that seating the
24 defendants further from the jury than the prosecutors impinges on the defendants'
25 fundamental rights, and therefore requests, pursuant to *Estelle*, that the Court closely

1 scrutinize the seating arrangements in the courtroom.

2 As has already been noted, there will be four defendants present for the course of the
3 trial. With their full team of attorneys, paralegals, interpreters, and technical personnel,
4 defense counsel have indicated that at least eleven people will need to be present at the
5 defendants' counsel table, and several more will need to be in close proximity. Security
6 personnel will also be present in close proximity to the defendants and the two defendants in
7 custody may need to be shackled. These facts all cut against Defendant Lopez's request.

8 First, it would be impossible to have all the defendants sit at the counsel table nearest
9 to the jury without causing one or more defendants to have either his back to the jury, his
10 back to the middle area of the courtroom, or be obscured--from the view of the jurors--by the
11 other people at counsel table. This is particularly true in light of the number of attorneys,
12 interpreters and defense team support staff that will be sitting at the defense table and the fact
13 that the podium and projector are located on the side closest to the jury. However, by seating
14 the defendants on the opposite side of the courtroom as is currently the plan, the defense
15 counsel tables can be arranged in an "L" shape, thereby allowing all of the defendants a view
16 of the entire courtroom, including the jury box. Additionally, some of the defendants will
17 even be seated facing the jury from across the room.

18 Second, the security concerns associated with this trial require that the defendants not
19 be seated immediately adjacent to the jury. While defendant Lopez is out of custody, two of
20 his co-defendants are not. There is no entrance to the defendants' holding cell on the wall
21 along which the jury box sits; there is only one entrance to the cell and it is immediately
22 behind the traditional defense tables. This door allows for swift removal of any of the
23 defendants should they pose a threat or should a threat be posed to them. Further, the far
24 greater amount of free space on the side of the courtroom typically reserved for the defense
25 will more easily handle the number of security personnel required for this case than could be

1 accommodated on the side containing the jury box, as the jury box takes up much of that half
2 of the courtroom.

3 But even more importantly, keeping the defendants on the side of the courtroom
4 typically designated for defendants will minimize, rather than exacerbate, the potential
5 prejudice they could face. If the defendants were to sit near the jury box, it is far more likely
6 that the jurors would see any security restraints such as their shackles--even with the benefit
7 of a skirted table--than if they are seated on the other side of the room facing the jury but
8 behind a skirted table. If possible, the Court would like to avoid a situation where any
9 restraints would potentially be visible to the jury. *See generally Deck v. Missouri*, 544 U.S.
10 622 (2005) (explaining that visible shackles are generally disfavored during criminal
11 proceedings). If the defense is seated close to the jury and, after trial begins, restraints are
12 required to be placed on the defendants during the 4-6 week span of the trial, the defense table
13 might need to be moved to the opposite side to conceal the restraints from the jury's view.
14 This sudden rearrangement after the commencement of the trial would likely raise the
15 curiosity of jurors and cause them to speculate, especially if this occurred after inappropriate
16 conduct by one of the defendants.

17 Additionally, if the defense were seated on the side of the courtroom nearest the jury as
18 requested, security concerns would require that security personnel be posted between the
19 defendants and the jurors. This would underscore and amplify the presence of the security
20 personnel in the eyes of the jurors and could more easily lead to the inference that the
21 defendants are dangerous individuals. Further, it would obscure the jury's view of the
22 courtroom and contribute to obscuring the defendants from the jurors' view, as well.

23 However, if the defendants sit on the side of the courtroom opposite the jurors, the
24 security personnel will have room to sit and can blend into the background a bit more easily
25 and will not have to physically stand between the jurors and the defendants. Such an

1 arrangement is preferable to this Court and is in the interest of both visibility, security, and
2 avoidance of prejudice, *see United States v. Jackson*, 549 F.2d 517, 526-27 (8th Cir. 1977)
3 (noting the importance of shielding jurors from exposure to security measures as much as
4 possible). Accordingly, Defendant Lopez's Motion will be DENIED.

5 However, the Court will GRANT Defendant Lopez's request for an instruction
6 advising the jurors that they are not to draw any inferences from the seating arrangements.

7 **B. Motion to Exclude Polygraph Evidence (ECF No. 187)**

8 In this Motion, the Government seeks to exclude the results of polygraph tests
9 performed on various potential witnesses and one Defendant--Defendant Webster. The
10 Motion does not, however, seek to preclude the statements voluntarily taken from individuals
11 during the course of the polygraph examinations. No Response has been filed.

12 The Ninth Circuit has "long expressed [its] hostility to the admission of unstipulated
13 polygraph evidence." *United States v. Cordoba*, 104 F.3d 225, 227 (9th Cir. 1997).
14 Nevertheless, there is no longer a *per se* rule excluding all unstipulated polygraph evidence
15 from criminal and civil trials. *See id.* at 227-228. However, a trial court may exclude the
16 results of polygraph examinations under Federal Rule of Evidence 403 if their probative value
17 is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or
18 misleading the jury, or by the considerations of undue delay, waste of time, or needless
19 presentation of cumulative evidence. *See United States v. Benavidez-Benavidez*, 217 F.3d
20 720, 725-26 (9th Cir. 2000). The Ninth Circuit reviews a "district court's decision to exclude
21 polygraph evidence under Rule 403 with considerable deference." *United States v. Cordoba*,
22 194 F.3d 1053, 1063 (9th Cir. 1999) (internal quotation marks omitted).

23 Exclusion is appropriate here. Because the Government does not object to appropriate
24 uses of the statements that were given during the course of the polygraph examination, the
25 only evidentiary use for the admission of the polygraph results would be to detract from or

1 support the credibility of the witnesses. However, this would diminish the jury's role in
2 making credibility determinations, *see United States v. Scheffer*, 523 U.S. 303, 313 (1998)
3 (explaining that "[b]y its very nature, polygraph evidence may diminish the jury's role in
4 credibility determinations"), and poses the risk of the jury substituting the credibility
5 determination made by the polygrapher for their own. This danger is particularly worrisome
6 because of the questionable accuracy of polygraph examinations, as well as the disagreement
7 over their reliability, *see Scheffer*, 523 U.S. at 309, combined with the fact that polygraphs
8 have a "misleading reputation as a truth teller," *see Dixon v. City of Coeur d'Alene*, No. 2:10-
9 cv-00078-LMB, 2010 WL 4867363, at *3 (D. Idaho Nov. 23, 2010) (internal citation
10 omitted). Indeed, "polygraph evidence has grave potential for interfering with the
11 deliberative process." *Cordoba*, 104 F.3d at 228.

12 The fact that one of the people who submitted to a polygraph test is a defendant in this
13 case makes no difference. The Ninth Circuit has routinely upheld district courts' decisions to
14 exclude the results of a defendant's polygraph exam. *See, e.g., Benavidez-Benavidez*, 217
15 F.3d at 726; *Cordoba*, 194 F.3d at 1063. Accordingly, the Government's unopposed motion
16 will be GRANTED.

17 **C. Motion to Admit Statements of Defendant Lopez-Buelna (ECF No. 188)**

18 In this Motion, the Government asks the Court to admit statements made by Defendant
19 Lopez-Buelna to Special Agent Daniel Leon of the FBI. The Government contends that
20 Defendant Lopez-Buelna was not in custody at the time he made the statements and argues
21 that, even if he were, the public safety exception to *Miranda v. Arizona*, 384 U.S. 436 (1966)
22 applies. Defendant Lopez-Buelna filed a Response (ECF No. 195) in which he contends that
23 he was in custody at the time the statements were made and that his verbal and nonverbal
24 statements are irrelevant and unfairly prejudicial. The Government provided an additional
25 proffer of evidence at the January 20, 2011 hearing and Defendant Lopez-Buelna claims he

1 was handcuffed to the hospital bed at the time the statements were provided.

2 1. The Statements

3 On October 17, 2008, while watching his residence but prior to executing a warrant on
4 it, Las Vegas Metropolitan Police Department ("LVMPD") detectives saw Defendant Lopez-
5 Buelna drive past them. The detectives stopped Defendant Lopez-Buelna and placed him in
6 handcuffs in the back of a police car. However, Defendant Lopez-Buelna began complaining
7 of chest pains, so paramedics were called and he was transported to the hospital in an
8 ambulance. It is unclear whether his handcuffs were removed once he was placed in the
9 ambulance. Special Agent ("SA") Leon and Detective Miller of the LVMPD followed the
10 ambulance to the hospital, knowing that Defendant Lopez-Buelna was a suspect in the
11 kidnapping and that the missing boy had still not been found.

12 Once at the hospital, Defendant was placed in 5' x 7' or 6' x 10' section of a larger
13 room which was partitioned by a curtain. The Defendant claims he was handcuffed to the
14 bed, however SA Leon does not recall if he was handcuffed. While the doctors were
15 attending to the Defendant inside the partitioned area, SA Leon and Detective Miller stood on
16 the opposite side of the curtain partition. When the doctors were done, they advised SA Leon
17 and Detective Miller they could go inside of the partition and speak with Defendant Lopez-
18 Buelna. They did so, and SA Leon introduced himself as an FBI agent who wanted to ask
19 some questions.

20 Defendant Lopez-Buelna did not respond to any of SA Leon's questions for the first
21 five minutes of the interview. SA Leon then took out his own Blackberry, brought a photo of
22 Tinnemeyer's missing grandson onto its screen, and then held the Blackberry six to eight
23 inches from Lopez-Buelna's face. When Lopez-Buelna moved his head to avoid looking at
24 the photo, SA Leon leaned over him and kept the Blackberry six to eight inches from his face.
25 SA Leon then asked Defendant Lopez-Buelna if he knew the boy's grandfather, Tinnemeyer.

1 Defendant Lopez-Buelna allegedly then turned red, began to tap his feet together, and told SA
2 Leon “you seem to know everything.”

3 SA Leon asked Defendant Lopez-Buelna if he knew whether the boy was dead or
4 alive, and then Lopez-Buelna allegedly became “very fidgety, exhaled loudly, and continued
5 to try and look away from the picture of [the boy].” SA Leon asked if Defendant Lopez-
6 Buelna knew why he was asking him about the boy’s location, and Lopez-Buelna responded
7 that SA Leon “seemed to know everything so why should he answer.” SA Leon asked if
8 Defendant Lopez-Buelna had sent any of his relatives to take the boy from his home, at which
9 point Defendant Lopez-Buelna’s eyes allegedly widened and he turned away from SA Leon.
10 SA Leon then asked Lopez-Buelna how he would feel if someone came into his home and
11 took one of his children. Defendant Lopez-Buelna allegedly then began to “tear up” and
12 indicated that he had nothing to say and all he wanted to do was sleep. SA Leon stopped
13 questioning Defendant Lopez-Buelna at that point.

14 The entire exchange allegedly lasted fewer than twenty minutes. No *Miranda* warning
15 was given before or during the course of this interview. By the time SA Leon and Detective
16 Miller left, an agent for United States Immigration and Customs Enforcement had arrived at
17 the hospital. The Government believes that there were other law enforcement personnel at
18 the hospital monitoring Defendant Lopez-Buelna for the duration of his stay there.

19 2. Discussion

20 a. Custodial Interrogation

21 *Miranda* warnings need only be given to a suspect in “custodial interrogation,” which
22 is “questioning initiated by law enforcement officers after a person has been taken into
23 custody or otherwise deprived of his freedom of action in any significant way.” *Miranda*, 384
24 U.S. at 444; *Stanley v. Schriro*, 598 F.3d 612, 618 (9th Cir. 2010) (“Under clearly established
25 federal law, *Miranda* warnings are required only where there has been such a restriction on a

1 person's freedom as to render him in custody." (citations and internal quotation marks
2 omitted)). "[C]ustody must be determined based on how a reasonable person in the suspect's
3 situation would perceive his circumstances." *Yarborough v. Alvarado*, 541 U.S. 652, 662
4 (2004). This requires a court to consider:

5 First, what were the circumstances surrounding the interrogation; and
6 second, given those circumstances, would a reasonable person have felt
7 he or she was not at liberty to terminate the interrogation and leave.
8 Once the scene is set and the players' lines and actions are
9 reconstructed, the court must apply an objective test to resolve the
ultimate inquiry: was there a formal arrest or restraint on freedom of
movement of the degree associated with a formal arrest.

10 *Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (footnote and internal punctuation omitted);
11 *see also Stansbury v. California*, 511 U.S. 318, 322 (1994) (per curiam) ("In determining
12 whether an individual was in custody, a court must examine all of the circumstances
13 surrounding the interrogation, but the ultimate inquiry is simply whether there [was] a formal
14 arrest or restraint on freedom of movement of the degree associated with a formal arrest."
15 (citations omitted)).

16 In assessing whether a hospitalized individual is in custody, courts often look to the
17 atmosphere and physical surroundings at the hospital to determine whether there was restraint
18 or compulsion by police officers or other state actors. *Gonzalez v. Sisto*, No. EDCV 07-760-
19 RGK(OP), 2010 WL 1994869, at *10 (C.D. Cal. Jan. 13, 2010). "If the police took a criminal
20 suspect to the hospital from the scene of a crime, monitored the patient's stay, stationed
21 themselves outside the door, arranged an extended treatment schedule with the doctors, or
22 some combination of these, law enforcement restraint amounting to custody could result."
23 *United States v. Martin*, 781 F.2d 671, 673 (9th Cir. 1985).

24 Here, many of the factors set forth in *Martin* were present. Although SA Leon and
25 Detective Miller were not the ones who actually transported Lopez-Buelna to the hospital,

1 they followed the ambulance all the way there. At the hospital, Lopez-Buelna was possibly
2 handcuffed to his hospital bed, but SA Leon and Detective Miller stationed themselves
3 outside of Lopez-Buelna's curtained partition while doctors attended to him. When the
4 doctors left and SA Leon and Detective Miller were advised they could enter, SA Leon
5 identified himself to Defendant Lopez-Buelna as an FBI agent. SA Leon questioned
6 Defendant Lopez-Buelna unsuccessfully then took out his Blackberry displaying a photo of
7 the missing boy. SA Leon held it six to eight inches from Defendant Lopez-Buelna's face.
8 When Lopez-Buelna tried to move his face to get away from the photo, SA Leon leaned over
9 him and followed his face with the Blackberry. This is certainly a situation in which a
10 reasonable person would not have felt free to terminate the interrogation and leave,
11 particularly if Defendant Lopez-Buelna was handcuffed to the bed for the duration of the
12 interview and was guarded by members of the law enforcement community during his entire
13 stay at the hospital. Thus, Defendant Lopez-Buelna appears to have been in custody.

14 b. The Public Safety Exception

15 Regardless whether Defendant Lopez-Buelna was in custody at the time he made the
16 statements proffered by the Government, the public safety exception to *Miranda* applies;
17 therefore, Defendant Lopez-Buelna's statements may be admitted. Although statements made
18 by a defendant as the result of a custodial interrogation are normally excluded under *Miranda*
19 when a proper *Miranda* warning was not given, the Supreme Court has articulated a narrow
20 exception to this rule where the safety of the public is in danger. *See New York v. Quarles*,
21 467 U.S. 649, 654-66 (1984).

22 In *New York v. Quarles*, the Supreme Court was confronted with a situation in which
23 police officers were pursuing an alleged rapist who was reported to be in possession of a
24 handgun. *Id.* at 651-52. One police officer found the suspect in a supermarket, but
25 temporarily lost sight of him. *Id.* at 652. Eventually, the officer caught up with the suspect

1 and frisked him, discovering a shoulder holster that was empty. *Id.* After handcuffing the
2 suspect, the officer asked him where the gun was. *Id.* The suspect nodded in the direction of
3 a few empty cartons and said “the gun is over there.” *Id.* The officer retrieved a .38 caliber
4 revolver from one of the cartons and formally placed the suspect under arrest. *Id.* At the
5 suspect’s trial for criminal possession of a weapon, the trial court suppressed the gun and the
6 statement because the defendant had not been given a *Miranda* warning. *Id.* at 651. The
7 Supreme Court reversed those rulings, finding that the public safety exception applied.

8 In reaching this conclusion, the Supreme Court explained:

9 In such a situation, if the police are required to recite the familiar
10 *Miranda* warnings before asking the whereabouts of the gun, suspects in
11 Quarles’ position might well be deterred from responding. Procedural
12 safeguards which deter a suspect from responding were deemed
13 acceptable in *Miranda* in order to protect the Fifth Amendment
14 privilege; when the primary social cost of those added protections is the
15 possibility of fewer convictions, the *Miranda* majority was willing to
16 bear that cost. Here, had *Miranda* warnings deterred Quarles from
17 responding to Officer Kraft’s question about the whereabouts of the
gun, the cost would have been something more than merely the failure
to obtain evidence useful in convicting Quarles. Officer Kraft needed an
answer to his question not simply to make his case against Quarles but
to insure that further danger to the public did not result from the
concealment of the gun in a public area.

18 *Id.* at 657. Likewise, the potential that Defendant Lopez-Buelna might have failed to respond
19 if he had first been given *Miranda* warnings could have negatively affected the public safety,
20 specifically that of the missing boy. Had Defendant Lopez-Buelna been deterred from
21 responding to SA Leon’s questions, the cost to the public could have been more than just the
22 inability to obtain evidence to convict Lopez-Buelna; the cost could have been the life or
23 safety of the missing boy.

24 Even SA Leon’s question about how Defendant Lopez-Buelna would feel if his child
25 were kidnapped did not appear to be designed to elicit evidence to be used to convict Lopez-

1 Buelna; but rather to elicit an emotional response that would help lead to the discovery of the
2 missing boy. It was objectively reasonable for SA Leon to believe that interviewing
3 Defendant Lopez-Buelna was necessary to protect the boy from immediate danger. *See Petit-*
4 *Homme v. McNeil*, No. 08-61019-CIV, 2009 WL 1884399, at *11 n.23 (S.D. Fla. June 30,
5 2009) (explaining that the public safety exception applies where it would have been
6 objectively reasonable for the officer to believe that asking a question was necessary to
7 protect the public or police from immediate danger).

8 Although the Ninth Circuit has not yet addressed whether the public safety exception
9 applies when law enforcement interviews a suspected kidnapper in an effort to discover the
10 location or condition of the victim, the Southern District of Florida has. *See Petit-Homme*,
11 2009 WL 1884399, at *11. In *Petit-Homme*, the trial court determined that a suspect's
12 responses to a police detective's questions regarding the location of kidnapped children would
13 not have been excluded, even in the absence of *Miranda* warnings, due to the public safety
14 exception to *Miranda*. *Id.* Similarly, Defendant Lopez-Buelna's statements to SA Leon will
15 not be excluded here.

16 Admitting Defendant Lopez-Buelna's statements is also consistent with the "rescue
17 doctrine" exception to *Miranda* embraced by California courts.¹ In *People v. Dean*, 39 Cal.
18 App. 3d 875, 879 (1974), a federal agent met a kidnapping suspect at the ransom drop;
19 ordered him to drop his gun; handcuffed him; and then asked the suspect where the victim
20 was. In response, the suspect named the address where the victim was ultimately found and
21 also provided information about the car that was going to pick him up. *Id.* Those statements
22 were admitted at trial, despite the fact that *Miranda* warnings were not given, and the Court of
23 Appeals affirmed. *Id.* at 886. The Court of Appeals explained that "[w]hile life hangs in the
24

25 ¹ As one commentator has explained, these "rescue doctrine" cases "logically fall under *Quarles* because they include a
substantial threat to someone's safety and involve emergency situations." Alan Raphael, *The Current Scope of the Public
Safety Exception to Miranda Under New York v. Quarles*, 2 N.Y. City L. Rev. 63, 76 (1998).

1 balance, there is no room to require admonitions concerning the right to counsel and to
2 remain silent.” *Id.* at 882; *see also United States v. Jones*, 19 M.J. 961 (A.C.M.R. 1985)
3 (applying the rescue doctrine exception to *Miranda* in military law proceedings). Such a
4 doctrine allows for the efficient, speedy rescue of kidnapping victims, which is important
5 because sometimes accomplices of the captured kidnapper are under instructions to kill the
6 victim if the kidnapper has not returned within a specified time. *See id.* at 883. At other
7 times, the victim could be harmed or dying or in a vehicle trunk, and might not otherwise be
8 discovered for days or weeks. *Id.* at 883-84.²

9 The same rationale justifies the exception in this case. SA Leon’s efforts to force
10 Defendant Lopez-Buelna to disclose information to him occurred while a kidnapped six-year-
11 old boy’s life was still arguably at risk.

12 c. Relevance of the Statements

13 The statements and conduct of Lopez-Buelna are relevant to whether he was involved
14 in kidnapping or a conspiracy to kidnap the missing boy, and appear highly probative of the
15 fact that Defendant Lopez-Buelna recognized or had knowledge of the child. Further, the fact
16 that Defendant Lopez-Buelna repeatedly stated that SA Leon seemed to know everything,
17 rather than disputing SA Leon’s statements, could be viewed as probative of Defendant
18 Lopez-Buelna’s involvement in the kidnapping. Although Defendant Lopez-Buelna may be
19 correct that his statements were merely “indicative of the fact that SA Leon was haranguing
20 Defendant Lopez-Buelna until he received some sort of response,” (Resp. 4:7-8, ECF No.
21 195) the statements could even more easily be viewed as evidence that Defendant Lopez-
22 Buelna, at the very least, recognized the kidnapped child. However, the interpretation to be
23

24 ² The facts of *People v. Krom*, 461 N.E.2d 276 (N.Y. 1984) justify such a concern. In *Krom*, a kidnapping suspect was
25 given a *Miranda* warning after being placed in custody. *Id.* at 278. The suspect elected to not divulge any information
until he had an attorney present, but it took so long to try to find a suitable attorney that, by the time the suspect finally
led law enforcement officers to the location of his victim, his victim had already suffocated in the box in which she was
being held captive. *Id.* at 278-79.

1 given goes to the weight of the evidence, not its admissibility, so it will be up to the jury to
2 decide which explanation they will accept. Accordingly, the Government's Motion will be
3 GRANTED.

4 **D. Motion to Play Surveillance Tape (ECF No. 197)**

5 In this Motion, the Government is requesting that the Court allow it to play segments
6 of a surveillance video made by the surveillance system of the ParaTransit bus that picked up
7 the child when he was released by his kidnappers on October 18, 2008. Defendant Lopez-
8 Buelna filed a Response (ECF No. 205), in which he contends that the surveillance footage is
9 not relevant and will only serve to unfairly prejudice the jury against him. The Government
10 filed a Reply (ECF No. 240), in which it argues that the tape was not cumulative; not
11 prejudicial; and necessary in order to prove the child's age.

12 The Government intends to play a portion of the surveillance video that begins at
13 10:30:07 p.m. on Saturday night, when the bus driver exclaims "look at that kid." (Mot. 2,
14 ECF No. 197.) The video then shows the entry of the child, his request to be taken to "[his
15 home address]" (Video time-stamped 10:30:36 pm), the bus driver's call to his dispatcher,
16 and a passenger's 911 call. The boy claims that he did not run away (10:31:09 pm), and
17 indicates that a male left him there on the street a "couple of minutes" before (10:32:19 pm).
18 He also explains that he had not seen his mom since Wednesday (10:39:52 pm), and that he
19 was with a "guy" who knows his grandpa (10:40:21 pm). He indicates that he is six years old
20 (10:33:20 pm).

21 The portion of the tape the Government initially intended to play also contains an
22 exclamation by a bus passenger to the effect of, "Oh, no, no, no. You mean the one that was
23 taken from Mexico for the drugs? I don't think that's him." This exclamation begins at
24 10:40:57 pm. However, the Government agreed at the January 20, 2011 hearing to redact that
25 statement from the video. Accordingly, the Motion will be GRANTED, with the stipulated

1 exclusion of the statement beginning at 10:40:57 must not be shown.

2 **E. Motion to Exclude Statements of Co-Defendant Vega-Rubio (ECF No. 200)**

3 In this Motion, Defendant Lopez-Buelna asks the Court to exclude a statement by
4 Defendant Vega-Rubio that implicates Defendant Lopez-Buelna in the kidnapping that is the
5 subject of this case. The Government filed a sealed Response (ECF No. 222), in which it
6 proposes to redact the portions of Defendant Vega-Rubio's statement that implicate
7 Defendant Lopez-Buelna. Defendant Lopez-Buelna indicated that he is satisfied with the
8 redacted version of the statement attached to the Response and has withdrawn his Motion
9 under the condition that the redacted version of the statement be used.

10 **F. Motion for a Jury Questionnaire (ECF No. 201)**

11 Defendant Lopez-Buelna filed this request for the use of a case-specific jury
12 questionnaire during the jury selection process because he believes that it would help expedite
13 the process and ensure that a fair and impartial jury is impaneled. No Response has been
14 filed.

15 Although the Court appreciates Defendant Lopez-Buelna's desire to ensure that the
16 proceedings run quickly and smoothly, it is not convinced that a written jury questionnaire is
17 necessary to achieve this, nor has Defendant Lopez-Buelna made a sufficient showing that
18 such a procedure is required.

19 The Court's oral questioning during voir dire will provide sufficient constitutional
20 safeguards to ensure that a fair and impartial jury is selected. Indeed, the Court has even
21 invited the parties to submit their own proposed questions for the potential jurors (*see* Am.
22 Order Regarding Trial 3, ECF No. 184), many of which the Court anticipates using during the
23 voir dire. Accordingly, the Court will consider the questions contained in the proposed jury
24 questionnaire that Defendant Lopez-Buelna enclosed with his Motion. Therefore,
25 Defendant's Motion is DENIED.

G. Motion to Exclude Drug Organization Evidence or Opinion Evidence (ECF No. 204)

Defendant Webster is requesting that the Court preclude the Government from producing an expert witness who will testify about “drug trafficking, drug trafficking organizations and the laundering of drug proceeds” (Mot. 3:15-16, ECF No. 204), because such testimony would be irrelevant and unfairly prejudicial, particularly if the expert characterizes Defendants as members of a “Mexican cartel.” Defendant Vega-Rubio has moved to join this Motion (ECF No. 228). The Government has filed a Response (ECF No. 236).

The expert Defendant Webster wishes to preclude from testifying is DEA Special Agent Christopher Cadogan, who will testify as to the modus operandi of drug distribution organizations. However, as even Defendant Webster acknowledges (Mot. 6:16-18, ECF No. 204), the Ninth Circuit does allow such expert testimony in multi-defendant drug cases involving a conspiracy to distribute contraband. *See United States v. Espinosa*, 827 F.2d 604, 612 (9th Cir. 1987) (“Law enforcement officers with sufficient qualifications may testify concerning the methods and techniques employed in an area of criminal activity”); *see, e.g., United States v. Bailey*, 607 F.2d 237, 240 (9th Cir. 1979).

Defendant Webster also contends that there is not sufficient evidence of a drug distribution conspiracy in this case to warrant an expert’s testimony concerning the manner in which drug distribution organizations operate. However, the Court is not persuaded. As the Ninth Circuit has explained, testimony concerning the modus operandi of drug trafficking organizations is appropriate when the government can produce evidence of the sort of activities commonly associated with drug trafficking. *See United States v. Gil*, 58 F.3d 1414, 1422 (9th Cir. 1995). Such activities often appear innocuous at first and, if reviewed separately, might not give rise to the suspicion that drug trafficking is occurring, but, when

1 viewed as a whole, can lead to the conclusion that drug trafficking is occurring. *See Gil*, 58
2 F.3d at 1418-19.

3 Here, the Government has indicated that it will proffer evidence that some of the
4 defendants were involved in an organization based in Las Vegas that sent motor homes across
5 the United States and occasionally to Mexico and Canada. These motor homes were
6 equipped with secret compartments and typically had a scout car driving ahead or behind the
7 motor home accompanying them to their destinations. Once at the destination, the drivers
8 would leave the motor homes in a designated spot for a designated period of time.
9 Sometimes they would exchange keys with another individual. Once the designated period of
10 time was over, the driver would return to the motor home and drive to the next destination,
11 repeating the same conduct once there.

12 The Government also proffered that two witnesses will explain what they believed to
13 be cocaine in the secret compartments of these motor homes. Additionally, the Government
14 will proffer a witness who will testify that he was one of these motor home drivers for several
15 years, during which time he told his friends and family that he traveling across the country
16 building homes, though he actually never built any homes. He will testify that he made up
17 this lie because he knew what he was doing was illegal, though he did not know exactly what
18 he was carrying. The Government also explains that the \$3.5 million recovered from
19 Tinnemeyer is wrapped in plastic in a manner that is consistent with the manner in which
20 drug trafficking organizations normally bundle their cash. All of this, taken together,
21 provides a sufficient factual basis for the Government to be able to call SA Cadogan, as these
22 activities are consistent with drug trafficking. Therefore, Defendant Webster's Motion to
23 Exclude Drug Organization or Opinion Evidence will be DENIED.

24 Further, the Government may refer to such conduct as "drug trafficking/distribution
25 operations." The Government has, however, agreed to refrain from making references to

1 “Mexican cartels” or characterizing the defendants as members of such “cartel” organizations
2 unless it lays a sufficient basis for using the terms,

3 **H. Motion for Exclusion of Testimony Concerning Defendant Webster’s Prior**
4 **Drug Use (ECF No. 209)**

5 In this Motion, Defendant Webster seeks to preclude any testimony regarding his
6 alleged prior drug use on the basis that such testimony would be irrelevant; would be
7 inadmissible character evidence; or, if relevant, unfairly prejudicial. At Calendar Call on
8 January 18, 2011, the Government agreed that the motion could be granted as to its case in
9 chief, but asked to reserve the right to proffer such evidence on cross-examination or rebuttal,
10 if necessary. Accordingly, Defendant Webster’s Motion will be GRANTED. The
11 Government may not introduce evidence regarding Defendant Webster’s alleged prior drug
12 use during their case in chief; however, they may seek to admit such evidence on rebuttal or
13 cross-examination for purposes of impeachment, if Defendant Webster chooses to testify.

14 **I. Motion to Preclude the Use of the Transcript from Defendant Lopez-**
15 **Buelna’s Plea Hearing (ECF No. 215)**

16 In this Motion, Defendant Lopez-Buena asks the Court to exclude the transcript of his
17 plea hearing in 2:08-cr-00292-GMN-PAL, in which Defendant Lopez-Buelna plead guilty to
18 illegal reentry. Defendant Lopez-Buelna contends that the transcript is inadmissible because
19 it is irrelevant; the danger of prejudice from the transcript substantially outweighs any
20 probative value it might have; and the transcript contains inadmissible character evidence.
21 The Government has filed a Response (ECF No. 219), in which it indicated that it only
22 intends to introduce the transcript in rebuttal if any of the defendants charged with Conspiracy
23 to Commit Hostage Taking or Hostage Taking assert the affirmative defense that all of the
24 alleged offenders in the hostage taking counts were nationals of the United States. At the
25 January 20, 2011 Hearing before this Court, Defendant Lopez-Buelna indicated that he would

1 stipulate to the fact that he is not a United States national, which was satisfactory to the
2 Government. Accordingly, this Motion will be GRANTED. The Government does,
3 however, reserve the right to use the transcript on rebuttal should any of the defendants
4 attempt to argue that Defendant Lopez-Buena is a United States national.

5 **CONCLUSION**

6 **IT IS THEREFORE ORDERED** that Defendant Roberto Lopez's Motion to Seat
7 Defendants at Counsel Table Nearest to the Jury (ECF No. 183) is DENIED.

8 **IT IS FURTHER ORDERED** that the Government's Motion to Exclude Polygraph
9 Results (ECF No. 187) is GRANTED.

10 **IT IS FURTHER ORDERED** that the Government's Motion to Admit Statements of
11 Defendant Lopez-Buelna (ECF No. 188) is GRANTED.

12 **IT IS FURTHER ORDERED** that the Government's Motion to Play Surveillance
13 Tape (ECF No. 197) is GRANTED under the condition set forth in this opinion.

14 **IT IS FURTHER ORDERED** that Defendant Lopez-Buelna's Motion to Exclude
15 Statements of Co-Defendant Vega-Rubio (ECF No. 200) is DENIED as moot.

16 **IT IS FURTHER ORDERED** that Defendant Lopez-Buelna's Motion for a Jury
17 Questionnaire (ECF No. 201) is DENIED.


18 **IT IS FURTHER ORDERED** that Defendant Webster's Motion to Exclude Drug
19 Organization Evidence or Opinion Evidence (ECF No. 204) is DENIED under the condition
20 set forth in this opinion.

21 **IT IS FURTHER ORDERED** that Defendant Webster's Motion for Exclusion of
22 Testimony Concerning Defendant Webster's Prior Drug Use (ECF No. 209) is GRANTED
23 under the condition set forth in this opinion.

24 **IT IS FURTHER ORDERED** that Defendant Lopez-Buelna's Motion to Preclude the
25 Use of the Transcript from his Plea Hearing (ECF No. 215) is GRANTED under the condition

1 set forth in this opinion.

2 DATED this 21st day of January, 2011.

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5 Gloria M. Navarro
6 United States District Judge
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